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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

Supreme Court No. R-15-0011

**PETITION TO AMEND
RULE 15.5 AND 39 OF THE
ARIZONA RULES OF
CRIMINAL PROCEDURE**

**DRAFT COMMENT OF ARIZONA
PROSECUTING ATTORNEYS'
ADVISORY COUNCIL IN OPPOSITION**

Pursuant to the Arizona Rules of the Supreme Court, Rule 28(C), the Arizona Prosecuting Attorneys' Advisory Council ("APAAC") hereby submits its comments in opposition to the Petition to Amend Rule 15.5 and Rule 39 of the Arizona Rules of Criminal Procedure. The requested modifications to these rules are unnecessary, have no corresponding civil counterpart, and will significantly hamper the discovery process and early resolution of cases in the criminal justice system.

I. BACKGROUND OF PETITION

In its Petition, the Maricopa County Public Defender asks this court to create a new system for the redaction of information from police reports and other discovery that is required by Arizona law and the rules of this Court. *See* A.R.S. § 13-4434; Rule 39, ARIZ. R. CRIM. P. The Petition raises several general problems that have occurred with

1 the redaction of a few reports from the Maricopa County Attorney's Office. There is no
2 indication in the Petition that this is a statewide problem that demands a drastic
3 statewide rule change. Additionally, each of the concerns raised in the Petition could be
4 adequately addressed by professional prosecutors and professional defense counsel
5 working together in good faith to resolve discovery issues as required by Rule 15.7(b) of
6 the Arizona Rules of Criminal Procedure. Finally, in addition to being unnecessary, the
7 requested changes would be overly time consuming to implement and burdensome on
8 law enforcement and prosecutors' offices. They would slow the discovery process in
9 virtually every prosecution agency throughout the State and negatively impact the early
10 disposition of cases in all courts.
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12 **II. DISCUSSION/ANALYSIS**

13 **A. Civil Discovery Rules Should Not be Imposed on the Redaction of** 14 **Victim Information in Criminal Cases.**

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16 Petitioner uses the Rules of Civil Procedure as the model for the requested
17 amendment to Rule 15.5 by proposing that a "log of redactions" be created with the
18 specific legal basis of each redaction set forth. *See* Rule 26.1(f), ARIZ. R. CIV. P.
19 However, the rules and nature of discovery in civil and criminal cases are vastly
20 different and, therefore, it is not appropriate to attempt to borrow a civil rule as the
21 framework for creating a new criminal rule. "Discovery" under the civil rules means,
22 among other things, written interrogatories, oral depositions, requests for production of
23 documents, and requests for admissions; all methods of discovery that are either not
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1 available or are rarely available in the criminal system. *See* Rule 26(a), ARIZ. R. CIV. P.
2 “Disclosure” as it is used in the civil rules is also significantly different from the
3 criminal rules. A disclosure statement is a written statement requiring, among other
4 things, that the parties set forth the factual basis of each claim or defense, the legal
5 theory upon which each claim or defense is based, a description of the substance of each
6 witness’ expected testimony, the substance of the facts and opinions of all experts, and
7 the computation of damages. *See* Rule 26.1(a), ARIZ. R. CIV. P. Criminal discovery, by
8 contrast, has a completely different purpose and meaning.
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12 Civil Rule 26.1(f), on which Petitioner seeks to model the new criminal rule,
13 applies only to “disclosure or discovery” that is withheld due to a claim of *privilege* or a
14 claim that it is protected as *trial-preparation material*. Rule 26.1(f), ARIZ. R. CIV. P.
15 Redaction of victim information in a criminal case, however, is not done based on a
16 claim of privilege or on the basis that the information is trial preparation material.
17 Redaction of victim information is a statutory mandate for prosecution agencies
18 imposed as part of the legislature’s constitutional obligation to protect the constitutional
19 rights of victims. A.R.S. § 13-4434(B) (“A victim’s identifying and locating
20 information that is obtained, compiled or reported by a . . . prosecution agency shall be
21 redacted by the . . . prosecution agencies from records pertaining to the criminal case
22 involving the victim including discovery disclosed to the defendant.”). Apparently
23 understanding that the civil rule, as written, would not reach the intended target –
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1 redaction of victim information in a criminal case – Petitioner proposes a modified rule
2 that omits the reference to materials subject to protection *as trial-preparation materials*
3 and instead expands the proposed rule to refer to materials “subject to protection.” See
4 Rule 26.1(f), Ariz. R. Civ. P.; [Petition at 10]. This simply highlights the fact that the
5 civil and criminal processes for disclosure and discovery are completely different and
6 that rules from one should not be applied to the other without ample justification. No
7 such justification exists in this situation.

10 **B. Petitioner’s Requested Rule Change is Unnecessary and Will**
11 **Significantly Slow the Criminal Discovery and Early Disposition**
12 **Court Process.**

13 Petitioner attempts to justify the creation of an additional criminal rule due to the
14 fact that sometimes redactions are made in such a way that it is difficult to know
15 whether the information was omitted from the report or if it was redacted. This is not a
16 new issue, and the use of black-out redaction rather than white liquid or white tape
17 would easily solve the problem without creating and implementing new, detailed
18 statewide rules for redaction. Prosecution agencies have recognized that it is better
19 practice to clearly identify where information is redacted, and most prosecution
20 agencies now redact in such a way that the redactions are obvious. In situations where a
21 redaction is not obvious for whatever reason, a simple question from the defense
22 attorney to the prosecutor should clarify what information was withheld. Such a simple,
23 efficient solution is far preferable to creating and implementing a new rule requiring a
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1 “log” of redactions with an explicit recitation of the legal reason for each redaction for
2 every criminal case.

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4 In addition, creating a “redaction log” in every case would be inefficient and
5 extremely burdensome in the criminal system. In the civil system, claims of privilege
6 and work-product in disclosure arise far more frequent than in criminal discovery and
7 the legal basis for those claims is unknown to the opposing side. By contrast, in the
8 criminal context redactions are made on very limited grounds and the defense knows
9 precisely why the redactions were made – they are required to protect the rights of
10 victims under Arizona’s law and rules. Requiring prosecutors to create an additional
11 log that specifies where each redaction occurs and the legal basis for the redaction is an
12 unnecessary waste of time and resources. It is an absurd resort to form over substance.
13 In the vast majority of criminal cases, the redactions and the legal basis for them are
14 readily understood. In the rare case where information is redacted and it is not
15 immediately apparent why that information was withheld, a very brief conversation with
16 the prosecutor will immediately resolve the issue.

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18 Early disposition courts would be especially impacted by this proposed new rule.
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20 Early Disposition Courts (“EDC”) and Regional Court Centers (“RCC”) were created to
21 speed the resolution of lower level criminal cases. According to the Judicial Branch of
22 Arizona, in FY2012 Maricopa County alone saw more than 11,500 cases filed in the
23 EDC courts, with a resolution rate above 90%, and 7,500 cases in RCC.

1 <http://www.superiorcourt.maricopa.gov/SuperiorCourt/CriminalDepartment/innovation.>

2 [asp](#). Requiring a “log of redactions” along with the legal basis for each redaction
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4 would significantly impair this process by adding unnecessary delay and would
5 significantly reduce the number of cases that could be sent to early resolution courts
6 because of the inability to produce the additional paperwork within the current
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8 disclosure timelines.

9 But the burden of the proposed rule will be felt well outside the large counties.
10 Smaller counties would also struggle to comply with these new, unnecessary
11 requirements due to their lower staffing levels and, in some cases, less automated
12 redaction systems. Every city prosecutor would likewise feel the impact, where the
13 criminal rule for limited jurisdiction courts requires disclosure of information by the
14 first pre-trial conference. In these offices, redactions are typically performed by support
15 staff and paralegals, and the requirement of creating detailed redaction logs would
16 significantly hamper those offices’ ability to get discovery to the defense in a timely
17 manner. As an example, last year the Mesa City Prosecutor’s Office handled over
18 18,000 cases. If a redaction log was needed, that City simply would not be able to
19 comply with its discovery obligations at its current staffing levels. Adding delay and
20 expense of this nature to solve the few issues raised in the Petition is unnecessary, over-
21 burdensome, and poor public policy.
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1 Petitioner presents another rare circumstance to justify the creation of this new
2 rule. Petitioner explains that in some police reports the redaction of information, such
3 as a victim's address, makes it difficult to understand what is happening in the report
4 when there are multiple addresses and the report is using those addresses to explain an
5 officer's movements. There is no question that such a circumstance *can* arise, but this
6 would happen in an extremely small number of cases and it hardly justifies a statewide
7 rule of redaction. When a case arises where redaction of protected victim information
8 causes the report to be difficult to understand counsel can quickly and easily work
9 together to readily resolve the issue without the need for time consuming, tedious rules
10 that would only be needed in a tiny fraction of criminal cases.
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12 Criminal practice involves a high volume and every part of the system -
13 prosecutors, defense counsel, and the courts - must maximize their resources. The rules
14 of criminal procedure put tight timelines on disclosure. In high volume counties, such
15 as Maricopa County, the turnaround time from receiving a police report, to charging, to
16 getting discovery ready for the defense must happen in a matter of days for hundreds of
17 cases. All the police reports and supplements that a prosecutor has to make a charging
18 decision must be duplicated, redacted, and disclosed to the defense attorney by the first
19 status conference which, in Maricopa County, is held before the deadline for the
20 preliminary hearing under the rules.
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1 **II. CONCLUSION**

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3 Petitioner is literally using exceptions to justify a rule. The fact that the requested
4 changes are unnecessary is bad enough; the fact that they will needlessly add significant
5 time to the preparation of discovery for the defense is worse. The Petitioner's requested
6 rule change is poor public policy and will do little to improve any aspect of the criminal
7 justice system while adding delay and expense. Therefore, APAAC asks this Court to
8 deny the Petition.
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11 RESPECTFULLY SUBMITTED this day of May, 2015.

12 SHEILA SULLIVAN POLK
13 YAVAPAI COUNTY ATTORNEY
14 Chair, Arizona Prosecuting Attorneys'
15 Advisory Council

16 ELIZABETH ORTIZ
17 Executive Director, Arizona Prosecuting
18 Attorneys' Advisory Council

19 By: _____
20 ELIZABETH ORTIZ

21 Electronic copy filed with the
22 Clerk of the Arizona Supreme Court
23 this _____ day of _____, 2015.

24 by: _____
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